

Program E

Court-Connected ADR: Mandatory Voluntary?

Program Overview

This program explores the considerations that should be taken into account when deciding whether to make participation in court ADR programs voluntary or mandatory.¹ Although the issue is often framed as an either/or question, a more accurate framing is: Where, on a continuum from absolutely mandatory (no escape possible) to purely voluntary, should the district's ADR processes (all or some of them) fall? In addition to the programmatic question of how mandatory or voluntary ADR should be within the district, the program organizers may want to address a related, but different, question: Whether a judge should exercise his or her power to order parties to go to ADR in a particular case?

This program provides a forum in which the district's judges, lawyers, clients, administrators and, perhaps, leaders in the dispute resolution field can address or revisit questions about the extent to which ADR programs and/or processes ought to be voluntary or mandatory, e.g., by examining various approaches to opting-in and to opting-out of ADR. In addition, the program addresses the variety of processes and criteria that decision-makers might use to determine whether parties in given cases may be relieved of the duty or required to participate in some form of ADR.

The program organizers have two options for presenting the program. The entire program may be devoted to a presentation, either by a group of panelists and/or expert(s) on court-connected ADR (Option One), or it may be divided between a panel discussion and/or expert's(s') presentation(s) and small discussion groups (Option Two). Instructions for both approaches are presented below.

Program Objectives

1. To raise and examine the major issues related to decisions about where ADR programs and processes should fall on the mandatory voluntary continuum
2. To provide the district's ADR program leaders with input from practitioners, judges and administrators in districts that are making or rethinking policy decisions related to mandatory voluntary ADR

¹ The factors affecting mandatory voluntary policy decisions can change over time, for example in response to changes in the local legal culture related to ADR, ADR-related legislation (e.g., the ADR Act of 1998) or developments in the law of confidentiality or in rules or laws related to pretrial processes.

Instructions for the Program

Program organizers have two options for presenting this program. Both options include panel presentations regarding the mandatory voluntary issue for court-connected ADR programs. Option Two adds small group discussions and therefore reduces the amount of time for the presentations. Program organizers should make the choice between the two options based on whether the district is interested in *giving the participants information* (Option One – no small group discussions) or *gathering input* from the participants (Option Two – shorter panel presentations plus small group discussions). If the district wants input, it is important to include small groups, because small groups generally ensure that more people will have an opportunity to speak and that the district will hear from those participants who are less comfortable speaking in a large group.

Option One – Presentations (without Small Group Discussions)

1. **Introductory Comments (10 minutes):** The program opens with the moderator's presentation of an overview of the program and the program objectives. The moderator then introduces the panelists and gives introductory comments about the mandatory voluntary issue. If the purpose of the program is to consider the issue in the context of a pending decision about whether to mandate ADR, the moderator should make that clear and invite the audience to take advantage of the opportunity to provide input into the decision during the question and response period.

- a. ***Panel Presentations and Conversation or Presentation by an Expert (55 minutes):***

Panel Presentation: The panelists make 10-15 minute presentations, depending upon the number of panelists, leaving 10-15 minutes for the moderator to facilitate a conversation among the members of the panel regarding the major issues they see relating to the mandatory voluntary continuum. The Presenters' Guide (included at the end of this program module) and the list of articles (at the end of this program module) will be useful to panelists and program organizers to ensure that panelists cover in depth and detail the issues that are most significant to the district.

or

Presentation by Expert or Experts: Program organizers might choose to focus the program on a single recognized expert in court-connected ADR in addition to or instead of the panel presentation. They might choose, instead, to invite two experts with different perspectives on the topic, who could present in a point-counterpoint format. The expert's(s') presentation(s) should:

- Highlight major issues raised by the decisions related to mandatory voluntary ADR;
- Review the various perspectives on these issues; and
- Discuss the policy and practical considerations of the decision.

Again, program organizers will find it helpful to refer to the Presenters' Guide and bibliography to ensure that the expert(s) covers in depth and detail the issues that are most to the district.

2. **Large Group Questions and Panel and/or Expert Responses (20 minutes):**

Following the panelists' (or the expert's) presentations, the moderator invites the audience to ask questions. This period might be organized as follows:

- a. Moderator invites participants to direct questions to particular panelists and/or expert, or
- b. Volunteers collect written questions, which contain the name of the panelist and/or expert to whom the question is addressed, and distribute them to the moderator.
- c. Moderator then reads the questions and directs them to panelists and/or expert(s) who take turns answering the questions.

3. **Concluding Remarks (5 minutes):** The session could conclude as follows:

- a. Moderator sums up the salient points presented in the program, thanks the panelists and/or expert(s) and the participants and concludes by naming the fundamental themes the moderator has heard expressed during the program, or
- b. All panelists (and the expert[s]) offer a final 1-minute comment about what they learned from the other panelists and participants and state whether they are rethinking the positions they expressed at the beginning of the program.

Option Two – Shorter Panel Presentations and Small Group Discussions

1. **Opening Presentation (10 minutes):** Same as Option One, above.

2. **Panel Presentations and Conversation (25 minutes):** Same as Option One, except the time is shortened.

or

Presentation by Expert or Experts: Same as Option One, except the time is shortened. If program organizers choose to use Option Two with small group discussions and also include a presentation by an expert or experts, then it would not be appropriate also to have presentations from other panel members, unless the length of time for the entire program were extended from 90 to 120 minutes or the number of panelists is reduced and their role is limited to commenting on the expert's presentation.

As noted above, regardless of the time allowed, limiting the number of panelists to four (for Option One) and two or three (for Option Two) allows the maximum opportunity for the panelists to interact and provide meaningful input.

3. **Small Group Setup and Discussions (25 minutes):** Following the panel presentations and conversation or the expert's presentation (and panelists' brief comments, if any), the participants engage in small group discussions at their tables. Facilitators lead the conversations. Facilitators should be assigned one or two issues from the issues listed in the Presenters' Guide. The participants' perspectives, which the group scribes will report back to the large group, will provide the district's ADR program leaders with input and recommendations regarding local viewpoints on the mandatory voluntary issue.

- a. The moderator introduces the small group discussions by explaining the purpose of the discussions and giving the following instructions:
 - Select a scribe to record the gist of the group's discussion, as well as specific recommendations suggested.
 - Imagine the district court has convened your group as a committee to advise the district's ADR program regarding whether to mandate ADR.
- b. In its advisory capacity, your group should:
 - Discuss the issues your group members believe to be the most critical to their recommendations; and
 - Reach a conclusion about whether to mandate ADR (or any specific ADR processes) and determine the rationale for that decision.

Program organizers should provide adequate supplies for recording the small group discussions, ideally, easels with pads and markers or, at least, pads and pens for taking notes. Additionally, the moderator and/or facilitators should encourage individual participants to write down and hand in their comments so they can be reviewed, even if they are not incorporated into the group's report.

4. **Small Group Reports, Questions-Responses and/or Panelist (and Expert or Experts) Comments (25 minutes):**

Following the small group discussions, the moderator asks each scribe to report back, very briefly, to the large group by presenting a summary of the highlights of each table's discussion and conclusions regarding mandatory ADR. In the remaining time allotted, the moderator facilitates a comment period in which the panelists and/or expert(s) share their observations or reactions to the group reports.

5. **Concluding Remarks (5 minutes): Same as Option One, above.**

Time for the Program

	Option 1 Panel and/or Expert Presentation	Option 2 Panel and/or Expert Presentation and Small Group Discussions
Introductory comments	10 minutes	10 minutes
Panel presentations & conversation	55 minutes	25 minutes
Small group setup & discussions		25 minutes
Large group questions & panel responses	20 minutes	
Small group reports & large group Q & R		25 minutes
Concluding remarks	<u>5 minutes</u>	<u>5 minutes</u>
Total time	90 minutes	90 minutes

Program Presenters

1. **Moderator:** The program's success depends heavily on a strong moderator who has considerable expertise and experience in court-connected ADR and can introduce the topic and raise the critical issues. The moderator should have the following qualifications:

- A lawyer with significant experience in the court's ADR program; or
- Experience in the administration of court-connected ADR programs, either from within or outside the district, and extensive involvement in policy discussions and decisions regarding court-connected ADR.

The moderator's role includes the following:

- Introducing and concluding the program
- Facilitating conversation among the panel members following their presentations
- Facilitating questions from the participants and responses from the panel members
- Option Two only: Setting up and overseeing small group discussions and facilitating reports from the small groups (see Instructions for the Program, Option Two, below)

2. **Panelists/facilitators:** The panel members should all have experience with court-connected ADR, either as court administrative staff, lawyers, judges or neutrals. In addition, they should have the following qualifications:

- Are engaging speakers
- Have flexible presentation styles
- Are respected within the district

The panel might include:

- At least one lawyer
- At least one client or a local United States Attorney
- At least one district judge, magistrate judge or bankruptcy judge
- At least one ADR program leader from within the district or from a district that has made a decision about whether its program should be mandatory or voluntary

For Option One, the ideal number of panelists is four or fewer; for Option Two, two or three.

Program organizers should interview prospective panelists about their perspectives on the mandatory voluntary question to ensure the panelists present divergent points of view not only on the ultimate question, but also on the rationale behind their positions.

If program organizers choose Option Two, following their presentations, the moderator and panelists and/or expert(s) (see below) will also act as facilitators and join the participants to facilitate the small group discussions.

3. **Expert(s)** (optional): A program focused on an expert or experts will be more or less effective depending on the experts' credentials in the area of mandatory voluntary ADR policy and their ability to present an engaging and thoughtful program. In addition to being an outstanding speaker, the expert should have the following qualifications:

- Academic experience in the ADR field, including researching and writing about court-connected ADR; or
- Experience in the administration of court-connected ADR programs, either from within or outside the district, and extensive involvement in policy discussions and decisions regarding court-connected ADR.

Contact information for these individuals is located in Appendix B of this Program Guide under the heading "Experts in Court-Connected ADR."

Room Set-up and Seating

The moderator and panel members sit on a dais or stage in order to be visible to participants. If Option One for the program is selected (see Instructions for the Program, Option One, below), the participants should be seated theatre style in rows.

If program organizers select Option Two, the participants should sit at round tables that seat 6-8. There should be one panel member to act as facilitator for each table. In larger districts, program organizers may need to recruit additional facilitators, if the number of tables exceeds the number of presenters. To work most effectively, organizers must plan

table seating at each table to ensure a sufficiently diverse representation of lawyers (plaintiff and defense), judges and court administrative personnel to create interesting and engaging small group conversation. Ideally, a table of 6-8 should seat a district judge, a magistrate judge and/or a bankruptcy judge, a defense lawyer, a plaintiff's lawyer and a member of the court staff. Organizers can pre-assign table seating and instruct participants where to sit as part of the registration or check-in process.

Written Materials

1. Presenters' Guide

Resources

Publications

1. Brazil, Wayne D., "Arguments for and against Mandatory Arbitration," 7 FJC Directions, Issue 14 (December 1994).
2. "Evaluation of the Early Mediation Pilot Programs," Judicial Council of California, Administrative Office of the Courts (2004). (Available on the web at www.courtinfo.ca.gov/reference/documents/empprept.pdf.)
3. Mack, Kathy, *Court Referral to ADR: Criteria and Research*, for the National ADR Advisory Council and Australian Institute of Judicial Administration and National Dispute Resolution Advisory Council (2003). (See pp. 47-48 for a review of empirical research on the impact of compulsory versus voluntary participation.)
4. "Mandated Participation and Settlement Coercion: Dispute Resolution as It Relates to the Courts," Society for Professionals in Dispute Resolution (1991).
5. Menkel-Meadow, Carrie, "An Adversary Culture: A Tale Of Innovation Co-Opted or The Law of ADR," 19 Fla. St. U.L. Rev. 1 (1991).
6. Wissler, Roselle, "Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research," 17 Ohio St. J. on Disp. Resol. 641 (2002).

***Court-Connected ADR: Mandatory Voluntary
Presenters' Guide
Issues Related to the Mandatory Voluntary Question***

The subject of mandatory voluntary ADR raises a multitude of issues too vast for the short program envisioned by this module to cover fully. Therefore, program planners should consider the relative importance of the potential issues and provide guidance to the panelists and/or expert(s) concerning the program's content and focus, taking into account local issues and concerns. In addition, if program planners decide to include small group discussions in the program (Option Two), this list of issues can be used to identify discussion topics. Below is a list of practical and theoretical issues related to question of mandatory voluntary ADR:

1. What is the purpose of the court's policy regarding ADR referrals or the ADR program? Policy considerations might differ from district to district and judge to judge. Is a primary purpose:
 - To reduce the caseload?
 - To help parties find a solution that will work better or be timelier than a determination by a judge or jury?
 - To provide parties the opportunity to select a dispute resolution process that will be best suited to their particular dispute?
 - To ensure the court's relevance in meeting the public's needs related to dispute resolution?
2. How is the mandatory voluntary decision affected by the individual case?
 - Are there categories of cases that are more politically sensitive and therefore should be exempt from mandatory ADR (as reflected, for example, in the exemption of civil rights cases from non-binding arbitration programs)?
 - Should cases in which the litigants have very limited resources or staying power be eliminated from mandatory ADR to make sure they are not effectively squeezed out of the 7th Amendment? Or are these perhaps the cases best suited to ADR, given the reduced ability of litigants with limited resources to make it all the way to trial?
 - Should *pro se* cases be eliminated from mandatory ADR?
3. Does the court have authority to make participation in ADR process "X" by parties with cases in category "Y" mandatory? What is the source of any such authority?
4. Does the court have authority to compel the Department of Justice or other federal agencies to participate in a given ADR process?
5. What about the timing of a requirement to participate in ADR? Does it make sense to require ADR only shortly before trial, if at all?
6. Who should raise the possibility of participation in ADR on behalf of the court? A district judge, a magistrate judge, other? Where? In an initial scheduling order? In a scheduling or status conference where counsel are present?

7. Are the neutrals paid or volunteers? If paid, by whom? For all or part of the ADR process? At a nominal fixed rate or average market fixed rate? At a fixed rate or the neutrals' normal market rate?
8. What about the use of magistrate judges as neutrals?
9. How do the factors of age, level of institutionalization and/or level of development of the ADR program affect the mandatory voluntary decision?
10. Is it fair and/or constitutional to force parties into ADR? How does the analysis change if the ADR process is free? Party-paid?
11. If the ADR process is mediation, could forcing mediation suppress the creativity essential for achieving outside-the-box resolutions?
12. Given that approaches to mediation vary greatly – from a settlement conference model, where the focus is on the mediator's evaluation of the likely outcome in litigation, to purely facilitative mediation, where parties determine the subject matter and the mediator directs the conversation in a positive direction – how is the analysis of whether and how to require participation in mediation affected by the particular kind of mediation that would be involved? And should the program allow parties to choose a particular kind of mediation?
13. Is the ADR process any more or less satisfying if parties have a choice about whether to participate?
14. Is the ADR process any more or less effective in achieving settlement if parties have a choice about whether to participate? Do cases that are voluntarily in ADR have a higher settlement rate?
15. How is the decision about whether the ADR program should mandate *attendance* in certain ADR processes influenced by the district's mandatory voluntary ADR policy?
16. How does the mandatory voluntary decision influence the number of cases that utilize ADR?
17. Do neutrals find it more satisfying to mediate cases in which parties appear voluntarily?
18. Does the analysis of any of these issues differ if they are considered in the context of the specific ADR processes of mediation, non-binding arbitration or early neutral evaluation?
19. What factors would cause parties to choose to opt out of voluntary ADR or insincerely go through the motions in mandatory ADR? Some factors might be:
 - A strategic decision to inundate and overwhelm an adversary via a scorched earth approach to litigation
 - A belief that the litigants must complete discovery before the case is ready for settlement
 - The expectation of better resolution terms on the eve of trial
 - The belief that settling a case in ADR will result in a shortfall in the lawyer's contingent or hourly fee
 - The plaintiff's belief that he or she has a strong case but very limited resources to pursue it, ironically producing an almost irrational insistence upon vindication at trial
20. Any additional questions the panelists think are relevant to the issue of whether the district should mandate ADR.

Court-Connected ADR: Mandatory Voluntary Feedback Form

After you have reviewed this module or used it to plan and/or present a program, we would appreciate your feedback. Please fax (415-556-6179) or mail this completed form to Robin Donoghue, Asst. Circuit Executive – Legal Affairs, Office of the Circuit Executive, 95 Seventh Street, Suite 429, San Francisco, California 94103-1526. Please feel free to attach additional pages.

Name: _____

Tel. no.: _____ E-mail address: _____

Location of the program: _____

1. How did you use the module? If you presented a program, was the program well received?

What factors likely account for its success or lack of success?

- Presenters? Please explain.
- Content? Please explain.
- Format? Please explain.

2. How can we improve the module?

3. How can we improve the Program Guide?

4. What issues regarding the mandatory-voluntary nature of your district's court-connected ADR program might be added to the issues discussed in this program?

5. Did experts make presentations in your program? If you would recommend them for other districts, please provide their names and contact information.

6. Please suggest topics for future ADR program modules.